Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1998

NATIONWIDE MUTUAL INSURANCE COMPANY,
Petitioner,

vs.

HOME INSURANCE COMPANY,
Defendant,

INSURANCE COMPANY OF NORTH AMERICA,
CIGNA CORPORATION, AND CIGNA
INTERNATIONAL CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a reinsurer that has agreed to assume an insurer's obligations to an insured, can destroy the privity thereby created between the insured and reinsurer by including a third-party disclaimer clause in the assumption reinsurance agreement.

PARTIES TO THE PROCEEDING

The parties to this proceedings are set forth in the caption. The parent companies and non-wholly owned subsidiaries of Petitioner Nationwide Mutual Insurance Company are:

Affiliate Agency, Inc.
Affiliate Agency of Ohio, Inc.
Allnations, Inc.
American Marine Underwriters, Inc.
Auto Direkt Insurance Company
California Cash Management Company
Colonial County Mutual Insurance Company
Colonial Insurance Company of California (Colonial)
Columbus Insurance Brokerage And Service GmbH
Companies Agency, Inc.
Companies Agency Insurance Services of California
Companies Agency of Alabama, Inc.
Companies Agency of Idaho, Inc.
Companies Agency of Illinois, Inc.
Companies Agency of Kentucky, Inc.
Companies Agency of Massachusetts, Inc.
Companies Agency of New York, Inc.
Companies Agency of Pennsylvania, Inc.
Companies Agency of Phoenix, Inc.
Companies Agency of Texas, Inc.
Companies Annuity Agency of Texas, Inc.
Countrywide Services Corporation
Employers Insurance Of Wausau, A Mutual Company
Employers Life Insurance Co. Of Wausau
F & B, Inc.
Farmland Mutual Insurance Company

Financial Horizons Distributors Agency of Alabama, Inc.
Financial Horizons Distributors Agency of Ohio, Inc.
Financial Horizons Distributors Agency of Oklahoma, Inc.
Financial Horizons Distributors Agency of Texas, Inc.
Financial Horizons Investment Trust
Financial Horizons Securities Corp.
Gates, McDonald & Company
Gates, McDonald & Company of Nevada
Gates, McDonald & Company of New York, Inc.
Gates, McDonald Health Plus, Inc.
Greater la Crosse Health Plans, Inc.
Insurance Intermediaries, Inc.
Key Health Plan, Inc.
Landmark Financial Services of New York, Inc.
Leben Direkt Insurance Company
Lone Star General Agency, Inc.
MRM Investments, Inc.
National Casualty Company
National Premium & Benefit Administration Company
Nationwide Investing Foundation
Nationwide Community Urban Redevelopment Corporation
Nationwide Properties, Ltd.
Nationwide Realty Investors, Ltd.
Nationwide Life and Annuity Insurance Company
Nationwide Cash Management Company
Nationwide Investment Services Corporation
Nationwide Mutual Fire Insurance Company
Nationwide Communications, Inc.
Nationwide Corporation
Nationwide Investing Foundation II

Nationwide Insurance Golf Charities, Inc.
Nationwide Insurance Enterprise Foundation
Nationwide Development Company
Nationwide Investors Services, Inc.
Nationwide Advisory Services, Inc.
Nationwide Agency, Inc.
Nationwide Separate Account Trust
Nationwide Indemnity Company
Nationwide Property and Casualty Insurance Company
Nationwide Management Systems, Inc.
Nationwide Financial Institution Distributors Agency, Inc.
Nationwide Financial Services, Inc.
Nationwide Financial Services Capital Trust
Nationwide HMO, Inc.
Nationwide Lloyds
Nationwide Life Insurance Company
Nationwide General Insurance Company
Nationwide Agribusiness Insurance Company
NCC of America, Inc.
NEA Valuebuilder Investor Services, Inc.
NEA Valuebuilder Investor Services Insurance Agency, Inc.
NEA Valuebuilder Investor Services of Ohio, Inc.
NEA Valuebuilder Investor Services of Oklahoma, Inc.
NEA Valuebuilder Investor Services of Texas, Inc.
NEA Valuebuilder Investor Services of Alabama, Inc.
NEA Valuebuilder Investor Services of Arizona, Inc.
NEA Valuebuilder Investor Services of Wyoming, Inc.
NEA Valuebuilder Investor Services of Nevada, Inc.
NEA Valuebuilder Investor Services of Montana, Inc.
Neckura Insurance Company
Neckura Holding Company (Neckura)

Neckura Life Insurance Company
Neckura General Insurance Company
NWE, Inc.
Pebsco of Texas, Inc.
Pebsco of Alabama
Pebsco of Arkansas
Pebsco of Massachusetts Insurance Agency, Inc.
Pebsco of Montana
Pebsco of New Mexico
Pension Associates Of Wausau, Inc.
Physicians Plus Insurance Corporation
Prevea Health Insurance Plan, Inc.
Public Employees Benefit Services Corporation
San Diego Lotus Corporation
Scottsdale Insurance Company (SIC)
Scottsdale Indemnity Company
Scottsdale Surplus Lines Insurance Company
SVM Sales GmbH
The Beak and Wire Corporation
Wausau Business Insurance Company
Wausau Underwriters Insurance Company
Wausau Insurance Co. (U.K.) Limited
Wausau Preferred Health Insurance Co.
Wausau (Bermuda) LTD.
Wausau Service Corporation
Wausau General Insurance Company
Wausau International Underwriters

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Irene C. Keyse-Walker and Michael L. Cohen, attorneys for Nationwide Mutual Insurance Company, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on August 6, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 150 F.3d 545 (1998) and is attached at Appendix, p. A1.

The opinion of the United States District Court for the Southern District of Ohio was entered on March 25, 1997 and is attached hereto at Appendix, p. A15.

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on August 6, 1998. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

None.

STATEMENT OF THE CASE

Petitioner Nationwide Mutual Insurance Company ("Nationwide") filed this lawsuit for damages and declaratory relief, when it ceased to receive the benefit of the bargain it had made to cut off its continuing liabilities for certain insurance losses arising out policies issued in the 1960's. It sued Home Insurance Company ("Home"), which had assumed the Nationwide liabilities at issue in 1977, through an assumption reinsurance agreement (the "Nationwide/Home Agreement"). It also sued INA Corporation (subsequently dismissed by joint motion), and Respondents Insurance Company of North America ("INA"), CIGNA Corporation, and CIGNA International Corporation (collectively "CIGNA defendants"), which had purchased a portion of the Home insurance business in 1983. The transaction (the "Home/CIGNA defendants Agreement"), included an assumption reinsurance agreement (the "Assumption Agreement"), under which the CIGNA defendants agreed to assume Home's obligations under the Nationwide/Home Agreement.

The United States District Court for the Southern District of Ohio first stayed Nationwide's claims against Home, and ordered those parties to arbitration, pursuant to an arbitration clause in the Nationwide/Home Agreement. The CIGNA defendants then moved for summary judgment, claiming that Nationwide could not assert a direct cause of action against them.

Nationwide countered that it had sufficient privity to sue the CIGNA defendants under either of two theories: 1) as a result of the CIGNA defendants' assumption of Home's liabilities, including the

Nationwide/Home Agreement, the CIGNA defendants "stepped into the shoes" of Home and were directly liable to Nationwide for breaches of the Nationwide/Home Agreement; and 2) because the Nationwide/Home Agreement was one of the obligations assumed by the CIGNA defendants under the terms of the Assumption Agreement, Nationwide was an intended third-party beneficiary of the Assumption Agreement, with a right to sue for breaches of the assumed obligations. At a minimum, Nationwide noted, the District Court should permit it to conduct discovery on the issue of the intent of the parties to the Assumption Agreement before granting summary judgment in favor of the CIGNA defendants.

The District Court agreed with Nationwide's first argument, rejected its alternative argument, and ordered the CIGNA defendants to join in the Nationwide/Home arbitration previously ordered. The District Court held that the CIGNA defendants "stood in the shoes" of Home, by virtue of their assumption of Home's obligations to Nationwide, and therefore had a direct obligation to Nationwide under the Nationwide/Home Agreement that Nationwide could enforce. But the District Court agreed with the CIGNA defendants that a third-party disclaimer clause in the Home/CIGNA defendants Agreement precluded Nationwide's alternative argument that its status as an intended third-party beneficiary of that Agreement gave it the right to sue the CIGNA defendants directly.

The CIGNA defendants appealed, arguing that as a matter of "basic Aristotelian logic," if Nationwide were not an intended third-party beneficiary of the

Assumption Agreement, it could not sue the CIGNA defendants for breaches of the Nationwide/Home Agreement. Nationwide cross-appealed, arguing that the District Court correctly held that the CIGNA defendants "stood in the shoes" of Home in the Nationwide/Home Agreement, and could be sued, along with Home, for breaches of that Agreement, but that Nationwide's alternative basis for a direct suit – third-party beneficiary status under the Assumption Agreement – was also viable. Nationwide reiterated that it was at least entitled to discovery on the issue of the parties' intent before summary judgment could be entered in favor of the CIGNA defendants.

The Sixth Circuit reversed, holding that the third-party disclaimer clause in the Assumption Agreement precluded a direct action by Nationwide against the CIGNA defendants. It rejected Nationwide's cross-appeal, and failed to address Nationwide's alternative request for additional discovery:

> The claims against the CIGNA defendants cannot be submitted to arbitration because the express disclaimer in the Assumption Agreement prevents Nationwide from suing the CIGNA defendants to enforce the reinsurance obligations the CIGNA defendants assumed from Home. We remand the case to the District Court to enter an order dismissing Nationwide's claims against the CIGNA defendants.

150 F.3d at 549. Thus, while recognizing that the CIGNA defendants assumed Home's reinsurance obligations to Nationwide, the Court refused to allow

Nationwide to enforce those obligations against the CIGNA defendants.

A. The Nationwide/Home Agreement.

In the early 1960's, Nationwide decided to participate in a reinsurance pool managed and administered in London by M.E. Rutty Underwriting Agency, Ltd. (the "Rutty Pool"). Rutty had the authority to reinsure various international risks, and assign fixed percentages of the risks underwritten to each of the Pool participants.

Although it withdrew from the Rutty Pool at the end of the 1966 underwriting year, Nationwide had continuing obligations to the cedents that purchased reinsurance during the years of Nationwide's participation. In the 1970's, Nationwide decided to withdraw from the London market altogether, and sought to find a company that would assume its Rutty Pool obligations. Home (acting as the issuing carrier for an unincorporated association of insurers known as AFIA), agreed to assume the Rutty Pool obligations. It entered into the Nationwide/Home Agreement (entitled "Reinsurance Contract No. R"), on April 15, 1977. Home and Rutty agreed that they would thereafter deal exclusively with each other until all Rutty Pool claims had been paid.

B. The Home/CIGNA Defendants Agreement.

In 1983, CIGNA purchased AFIA's operations, including all of its assets, liabilities, and contingent liabilities. The documents consummating the purchase included "Purchase Agreement No. 1," "Insurance and

Reinsurance Assumption Agreement," and "Quota Share Reinsurance Treaty Agreement". The Assumption Agreement required a CIGNA entity (INA) to assume all of the AFIA members' insurance and reinsurance liabilities. CIGNA guaranteed the obligations of INA.

Under the Assumption Agreement, the CIGNA defendants would manage and be responsible for all losses arising from AFIA's business. The CIGNA defendants received all loss reserves held for AFIA business, and the AFIA administrative infrastructure needed to manage its contingent liabilities (including the Rutty Pool liabilities).

Thereafter, the CIGNA defendants, assisted by Rutty, administered the AFIA operations, including the Rutty Pool claims. Nationwide and Home were out of the loop, consistent with the requirements of the Assumption Agreement that:

> In consideration of the transfer by [AFIA] of the assets ... INA hereby assumes as its direct obligation and agrees to pay on behalf of each Seller when payment thereof is due all insurance and reinsurance liabilities of each ....

In May, 1989, the CIGNA defendants reiterated to another former participant in the Rutty Pool that:

> [T]he CIGNA group of companies has assumed full responsibility for all legitimate liabilities of the Home in connection with its participation as reinsurer of Rutty Pool members .... It is, therefore, entirely inappropriate for you to correspond with the Home Insurance Company of

> New York, which has no involvement of this business.

As Rutty Pool liabilities continued, however, the CIGNA defendants became derelict in their duties. They began to distance themselves from the Rutty Pool liabilities, ultimately invoking the following clause in the Assumption Agreement to deny any legal responsibility for their derelictions:

> Nothing in this Assumption Agreement, express or implied, is intended, or shall be construed, to confer upon or give to any person, firm or corporation (other than the parties hereto ...) any rights or remedies under or by reason of this Assumption Agreement, or any term, provision, condition, undertaking, warranty, representation, indemnity, covenant or agreement contained herein. ...

The Sixth Circuit agreed with the CIGNA defendants, concluding that notwithstanding their direct assumption of Home's liability to Nationwide, the CIGNA defendants obliterated the very obligation they undertook to perform by inserting a disclaimer clause into the Assumption Agreement.

REASONS FOR ALLOWANCE OF THE WRIT

The Sixth Circuit recognized that the Assumption Agreement is assumption reinsurance (as opposed to the more common indemnity reinsurance). *See, e.g.*, 150 F.3d at 547 ("the reinsurance on [policies Rutty had written in the name of Nationwide] had passed to the CIGNA defendants through the Assumption Agreement"). Once the nature of the parties' reinsurance agreement is established, their legal relationship arises by operation of law. Specifically, assumption reinsurance creates privity between the reinsurer and the insured as a matter of law. The Sixth Circuit wholly ignored this basic principle of insurance law, allowing the "tail" of a disclaimer clause to wag the "dog" of assumption reinsurance.

This Court has twice accepted and decided cases examining the nature and legal effects of reinsurance. *See Colonial American Life Insurance Co. v. Commissioner of Internal Revenue*, 491 U.S. 244 (1989) (*"Colonial"*) (resolving a split in the Circuits over whether reinsurance ceding commissions could be deducted in the year costs were incurred, by analyzing the nature and effect of indemnity and assumption reinsurance agreements); *Hartford Fire Insurance Co. v. California*, (*"Hartford"*) 509 U.S. 764 (1993) (addressing the nature and characteristics of reinsurance to determine whether reinsurers who agreed or acted with foreign reinsurers lost their McCarran-Ferguson Act immunity). Although neither the federal tax code nor the McCarran-Ferguson Act is implicated in this case, federal concerns are no less important.

Assumption agreements serve the international insurance industry by providing a means for one insurer to transfer all or part of its book of business to another, without having to novate thousands (or hundreds of thousands) of individual policies. Assumption agreements serve the interests of policyholders by creating a direct debtorship in the assuming company, and thereby doubling the solvent sources available to cover losses. By creating a second debtorship, assumption agreements give rise to a direct cause of action by the policyholder against the assuming company.

In an era of insurers financially weakened by catastrophic asbestos and pollution claims, and global consolidation in the insurance industry, such dual sources of recovery are critical. The assets of liquidating companies, even in conjunction with state guaranty funds, often cannot cover the incurred losses.

The Sixth Circuit decision in this case effectively allows acquiring companies to have the benefit of loss reserves for assumed obligations, while shielding themselves from the fiduciary responsibilities accompanying the assumed obligations. The insurer that uses an assumption agreement to transfer some or all of a book of business, generally transfers assets, in the form of loss reserves, corresponding with the transferred liabilities. The transferor company thereafter has decreased financial wherewithal to indemnify covered claims, while the acquiring company has full use of the assets. The well-established rule of law that makes the acquiring company directly liable for

the assumed obligations simply follows the asserts available to indemnify the loss.

A. A rule of contract interpretation established by one Circuit that ignores and rewrites the basic reinsurance principles uniformly applied nationwide for over a century, creates confusion in the global arena of reinsurance.

In *Colonial, supra*, this Court explained assumption reinsurance, as distinct from indemnity reinsurance, as follows:

> Reinsurance comes in two basic types, assumption reinsurance and indemnity reinsurance. In the case of assumption reinsurance, the reinsurer *steps into the shoes of the ceding company* with respect to the reinsured policy, assuming all its liability and its responsibility to maintain required reserves against potential claims. The assumption reinsurer thereafter receives all premiums directly and becomes directly liable to the holders of the policies it has reinsured. In indemnity reinsurance ... it is the ceding company that remains directly liable to its policyholders, and that continues to pay claims and collect premiums. The indemnity reinsurer assumes no direct liability to the policyholders. Instead, it agrees to indemnify, or reimburse, the ceding company for a specified percentage of the claims and expenses attributable to the risks that have been reinsured, and the ceding company turns

> over to it a like percentage of the premiums generated by the insurance of those risks.

491 U.S. at 247 (emphasis supplied). Consistent with that explanation, this Court noted in *Hartford, supra*:

> [R]einsurance is so closely tied to the terms of the primary insurance contract that one of the two categories of reinsurance (assumption reinsurance) *substitutes* the reinsurer for the primary or "ceding" insurer and places the reinsurer *into contractual privity* with the primary insurer's policyholders.

509 U.S. at 806 (emphasis supplied). This Court's descriptions of assumption reinsurance – the reinsurer "steps into the shoes of" and "substitutes" for the primary insurer, and is placed "into contractual privity" with the insured – are in full accord with insurance law and treatises. *See, e.g.*, 8 Crouch, *Cyclopedia of Insurance Law*, § 2276, p. 7434:

> [I]n any case where the contract of reinsurance is more than a mere contract of indemnity, and is made for the benefit of the policyholders of the reinsured, and by it the reinsurer assumes the liability of the latter upon its policies, the liability of the reinsurer may be directly enforced by the insured, or by his privies.

The essential flaw in the Sixth Circuit's decision is that it ignores the effect of assumption reinsurance on the parties' legal relationships. For over 100 years, it has been the law in the United States that assumption reinsurance establishes privity between the original

insured and the reinsurer. In addition to *Colonial, supra,* and *Hartford, supra, see*:

> *Johannes v. Phoenix Ins. Co.*, 27 N.W. 414, 417 (Wis. 1886) (where reinsurer assumed the risk of reinsured policies, "[t]he mere fact that the plaintiff was not named in the contract does not preclude him from maintaining an action upon the contract. Thus the policy 'for whom it may concern,' assures all persons having an insurable interest that are intended to be covered by it, whether known to the insurers or not");
>
> *Barnes v. Hekla Fire Ins. Co.*, 57 N.W. 314 (Minn. 1893), syllabus (where a contract of reinsurance "includes a promise or agreement to assume and pay the losses of policy holders, actions, in case of loss, may be brought by them directly against the reinsurer, upon such promise or undertaking");
>
> *Whitney v. American Ins. Co.*, 59 P. 897, 900 (Cal. 1900) (where the reinsurer assumes the risks of the reinsured policies, "[t]he law creates a privity necessary for the maintenance of the action" by the insured against the reinsurer);
>
> *Shoaf v. Palatine Ins. Co.*, 37 S.E. 451 (N.C. 1900) ("[I]t is the implied right, arising out of the express agreement of the defendant [to assume the insured's liabilities], that enables the plaintiffs [insureds] to maintain the action [against the reinsurer]");
>
> *Ruohs v. Traders' Fire Ins. Co.*, 78 S.W. 85 (Tenn. 1903) (where the intent of the reinsurance

agreement was for a reinsurer to assume the insurer's liabilities and stand in the shoes of the insurers vis-a-vis policyholders, insured could recover directly from the reinsurer);

Cosmopolitan Life Ins. Ass'n v. Koegel, 53 S.E. 166 (Va. 1905) (in the case of assumption reinsurance, the law creates the privity that permits a direct action by the insured against the reinsurer);

Southern States Fire Ins. Co. v. Hand-Jordan Co., 73 So. 578 (Miss. 1917) (where policy of reinsurance expressly provides that reinsurer agrees and obligates itself to assume and pay liability under terms of assumed policies, it is an agreement upon which the policyholder is entitled to maintain an action directly against a reinsurer);

People ex rel. Kane v. National Surety Co., 188 P. 653 (Colo. 1920) (where reinsurer agrees to fulfill the obligations of insurer, an insured may sue the reinsurer directly);

Delp v. Missouri State Life Ins. Co., 182 S.E. 580 (W.Va. 1935), syllabus ("A reinsurer, assuming the obligations of the reinsured to the policyholders, is directly liable to the policyholders);

United States Fire Ins. Co. v. Smith, 164 So. 70 (Ala. 1935) (contract of reinsurance whereby reinsurer assumes original insurer's liability on policy, authorizes insured to sue reinsurer directly); and

O'Hare v. Pursell, 329 S.W.2d 614 (Mo. 1959) (where policy of reinsurance provided that reinsurer would assume policy liability, take over loss reserve, and service, adjust and settle obligations directly with insureds, policyholder had direct cause of action against reinsurer).

New York law (which governs the Assumption Agreement in this case) is in accord. *See Glen v. Hope Mut. Life Ins. Co.*, 56 N.Y. 379, 381 (1874) ("[i]t is the settled law that the [insureds] might maintain their action against the [reinsurer] on the three policies which, by its agreement, it had assumed").

In today's global economy, insurance risks are routinely shared in international reinsurance pools. The nature of the reinsuring agreement – indemnity or assumption – is critical to the willingness of participants to engage in a particular transaction. The failure of a United States Circuit Court of Appeal to acknowledge and enforce assumption reinsurance threatens the free flow of international insurance commerce. Such clear error further invites confusion in the application of federal laws – tax, bankruptcy, and antitrust, for example – to the international insurance industry.

B. The Sixth Circuit's conclusion that a third-party disclaimer "tail" can wag the "dog" of an assumption reinsurance agreement contravenes basic rules of insurance and contract law, and is antithetical to commercial reasonableness and the logical intent of the parties.

A disclaimer clause does not change the nature of the obligation assumed in assumption reinsurance, or obliterate the privity of contract supplied by law. The Sixth Circuit committed clear error when it ignored the effect of assumption reinsurance on the legal relationships of the parties, and relied wholly upon New York law indicating that courts will enforce third-party disclaimer provisions.

New York law is certainly not unique in that it will enforce numerous provisions in a party's contract, including third-party disclaimer clauses. But New York law, as the law of other jurisdictions, also seeks to enforce the intent of the parties as evidenced by the contract as a whole. *See, e.g., Empire Properties Corp. v. Manufacturer's Trust Co.*, 43 N.E.2d 25 (N.Y. 1942).

Here, the essential undertaking of the Assumption Agreement is the CIGNA defendants' direct assumption of AFIA's obligations and liabilities, including Home's obligations to cut off Nationwide's Rutty Pool liabilities. It is well established that other provisions in an assumption reinsurance agreement cannot be interpreted to limit or defeat that essential obligation, or impinge on the privity it creates between the reinsurer and insured.

In *Shoaf v. Palatine Ins. Co., supra*, for example, the reinsurer (Palantine Company) sought to avoid a direct suit by the policyholders of the insurer (Merchants' Company) by invoking Article 10 of the reinsurance contract, which:

> . . . provides that [the contract] shall only be effective as between the parties thereto; that no holder of a policy in the Merchants' Company shall be entitled to enforce his contract against the Palantine Company; that the holders of such policies shall prosecute against the Merchants' Company any claim arising under said policy; and the Palantine Company "agrees to pay all such claims legally arising and duly proved ...."

37 S.E. at 451. Rejecting the argument, the North Carolina Supreme Court held that the policyholders' right to sue the reinsurer directly was implied from the nature of the reinsurer's express agreement to assume the obligation. *Id.* at 452 ("It is the implied right, arising out of the express agreement of the defendant, that enables the plaintiffs to maintain the action.") Article 10 of the contract could not defeat that implied right:

> If the plaintiffs have a right to sue the defendant, as we think they have, the two companies cannot, by any agreement between themselves, to which plaintiffs are not a party, defeat that right.

Id.

The assumption reinsurance agreement at issue in *Ruohs v. Traders' Fire Ins. Co., supra*, provided that the agreement would become void if the insurer

(Traders' Company) failed to make certain payments to the reinsurer. 78 S.W. at 85. The Tennessee Supreme Court held that having agreed to assume the Traders' Company liabilities, the reinsurer could not simultaneously escape that obligation by declaring the contract of reinsurance to be void. The Traders' Company's assets and reserves had been transferred to the reinsurer, and "the outstanding policy holders who had been deprived of the assets of the Traders' Company as a security and indemnity for their individual losses could not be prejudiced by such a conditional defeasance whereof they had no knowledge." *Id.* at 91. *See also, People ex rel. Kane v. National Surety Co., supra*, 188 P. at 654 (provision in assumption reinsurance agreement in which reinsurer agrees to "repay" insurer for losses would not affect essential agreement of reinsurer to assume liabilities, which gave rise to a direct right of action by the policyholder against the reinsurer).

Similarly, in this case, the assets and reserves available to pay Rutty Pool losses were transferred from AFIA to the CIGNA defendants. Having received those assets, and having expressly agreed to assume Home's obligations to Nationwide, the CIGNA defendants cannot defeat Nationwide's rights by including a third-party disclaimer clause in the Assumption Agreement.

Instead of applying this well-established law, the Sixth Circuit goes to extreme lengths to ignore the effect of the Assumption Agreement on the legal relationship between Nationwide and the CIGNA defendants. First, it dismisses the CIGNA defendants' essential undertakings in the Assumption Agreement as

irrelevant, because "whether or not there was a direct assumption does not alter the decisive fact that Nationwide is a stranger to the Assumption Agreement," and the Agreement contains a third-party disclaimer clause. 150 F.3d at 549. Next, the Court does away with the Assumption Agreement entirely, concluding that the effect of the disclaimer clause is to leave Nationwide and other insureds:

> ... with exactly the same recourse they would have had if Home and the other members of AFIA had never entered into the Assumption Agreement.

Id. at 549. Finally, the Court asserts that "[t]here is nothing wrong" with its obliteration of the Assumption Agreement, because Nationwide can still pursue its claims against Home and Home "may implead the CIGNA defendants as third-party defendants to Nationwide's action ...." *Id.* at 549.

That will never happen. As part of the Home/CIGNA defendants Agreement, the CIGNA defendants agreed to indemnify Home in any litigation arising out of the assumed obligations. Home therefore will not "implead" the CIGNA defendants when it is sued on the obligations the CIGNA defendants assumed. What will happen is exactly what happened in this case – the CIGNA defendants will take over the defense of Home, one attorney will represent both, and that attorney will strenuously argue that Home stands as an impenetrable barrier between the insured and the CIGNA defendants, thereby insulating the CIGNA defendants from any direct liability should Home become insolvent.

This, then, is the nature of assumption reinsurance as defined by the Sixth Circuit. A reinsurer (like Home) can transfer its reinsurance liabilities to a second reinsurer (like the CIGNA defendants) through an assumption reinsurance agreement that includes a promise to indemnify the first reinsurer in any lawsuit arising out of the assumed obligations. Since it is going to be indemnified in any future lawsuit, the first reinsurer freely agrees to the inclusion of a third-party disclaimer clause in the assumption reinsurance agreement. Now the second reinsurer can escape any direct responsibility for performing its assumed obligations, by claiming that the insureds to whom a duty is owed are "strangers" to the assumption reinsurance agreement.

Such a result perverts the lawful expectations of parties to assumption reinsurance contracts and distorts the international reinsurance market.

CONCLUSION

The District Court properly applied a rule of law that has been uniformly enforced for over a century, when it concluded that because the CIGNA defendants entered into an assumption reinsurance agreement, they "stepped in the shoes" of Home, providing Nationwide a direct right of action for breaches of the assumed obligations. *See Colonial, supra*, 491 U.S. at 247 ("In the case of assumption reinsurance, the reinsurer steps into the shoes of the ceding company"); *Hartford Fire, supra*, 509 U.S. at 806 (assumption reinsurance "places the reinsurer into contractual privity with the primary insurer's policyholders"). The Sixth Circuit skewed that uniform line of authority when it held that the primary

insurer and reinsurer could defeat the primary undertaking of assumption reinsurance by including a third-party disclaimer clause in their agreement. Such a massive rewriting of basic insurance law, and defeat of policyholder rights, should not be accomplished by fiat.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT

NATIONWIDE MUTUAL INSURANCE COMPANY,
Plaintiff-Appellee (97-3325)/Cross-Appellant (97-3405),

v.

HOME INSURANCE COMPANY,
Defendant,

Insurance Company of North America; INA Corporation; Cigna Corporation; Cigna International Corporation,
Defendants-Appellants (97-3325)/
Cross-Appellees (97-3405).

Nos. 97-3325, 97-3405

United States Court of Appeals, Sixth Circuit

Argued June 18, 1998.

Decided Aug. 6, 1998.

Insurer brought suit against reinsurer and against assignees that had assumed reinsurer's obligations for breach of reinsurance contract. The United States District Court for the Southern District of Ohio, Edmund A. Sargus, Jr., J. dismissed claims against reinsurer pending arbitration, denied assignees' motion for summary judgment, and dismissed claims against assignees pending arbitration. Assignees appealed, and insurer cross-appealed. The Court of Appeals, Boggs,

Circuit Judge, held that: (1) third-party disclaimer in assumption agreement precluded direct suit by insurer against assignees and limited insurer to exercising its rights against reinsurer, and (2) effect of insolvency clause in assumption agreement was not ripe for adjudication.

Reversed.

[546] Randolph Carson Wiseman, Bricker & Eckler, Columbus, OH; Irene C. Keyse-Walker, Arter & Hadden, Cleveland, OH; Michael L. Cohen, Scanlan, Rosen & Shar, Baltimore, MD, for Plaintiff-Appellee/Cross-Appellant.

Gerald P. Ferguson (briefed), Vorys, Sater, Seymour & Pease, Columbus, OH; Clifford H. Schoenberg (argued and briefed), Harry P. Cohen (briefed), Philip J. Loree (briefed), Rosenman & Colin, New York City, for Defendants-Appellants/Cross-Appellees.

Before: MERRITT, BOGGS, and SUHRHEINRICH, Circuit Judges.

OPINION

BOGGS, Circuit Judge.

Nationwide Mutual Insurance Company ("Nationwide") sued Home Insurance Company ("Home"), INA Corporation Insurance Company of North America ("INA"), CIGNA Corporation, and CIGNA International Corporation. [FN1] In its complaint, Nationwide alleged that Home and the CIGNA defendants had breached reinsurance contracts under which they were responsible for paying certain claims

filed against Nationwide. Nationwide sought declaratory relief as well as compensatory and punitive damages. The district court stayed Nationwide's claims against Home pending arbitration. The parties do not appeal this ruling.

> FN1. When discussed collectively, INA Corporation, INA, CIGNA Corporation, and CIGNA International Corporation will be referred to as "the CIGNA defendants."

After the claims against Home were dismissed pending arbitration, the CIGNA defendants sought summary judgment on the claims against them. The district court denied the CIGNA defendants' motion, referred the claims against the CIGNA defendants to arbitration, and dismissed the entire case. This is the ruling that is the subject of the CIGNA defendants' appeal. Nationwide cross-appeals the district court's rejection of its third-party beneficiary argument, which it claims provides an alternative basis for holding that it can bring an action directly against the CIGNA defendants.

I

A. Nationwide's Reinsurance Agreement With Home

In the 1960's, Nationwide entered into a reinsurance pool managed by the London firm of M.E. Rutty Underwriting Agency Limited ("Rutty"). As a member of this reinsurance pool, Nationwide authorized Rutty to get, underwrite, and administer direct insurance and reinsurance business. Rutty issued policies and contracts in the name of one of the pool members. The pool member whose name was on the insurance policy or reinsurance contract was directly responsible to the

insured. However, the premiums and losses arising from the insurance policies and reinsurance contracts Rutty entered into on behalf of the pool members were divided proportionately among all of the pool members.

Nationwide and some other members of the Rutty Pool withdrew from the pool in 1966. After it withdrew from the pool, Nationwide still had ongoing obligations for continuing and contingent liabilities under insurance policies and reinsurance contracts Rutty issued in its name while it was a member of the pool. To "cut off" its potential future liabilities for insurance and reinsurance obligations arising from its participation in the pool, on June 22, 1977, Nationwide entered into a reinsurance agreement with Home. Under the agreement, Home reinsured [FN2] Nationwide for "all losses which [Nationwide] [547] may be or may become liable to pay arising out of risks written for" Nationwide through the Rutty Pool. This reinsurance agreement contained a broad arbitration clause, permitting either party to compel arbitration as to any disputes relating to the agreement.

> FN2. Home entered into the reinsurance agreement with Nationwide through an insurance pool of United States-domiciled insurers called the American Foreign Insurance Association ("AFIA"). AFIA engaged in foreign insurance and reinsurance business on behalf of Home and its other members. Like Rutty, AFIA would issue insurance policies or reinsurance contracts in the name of a member company that was directly lible to the insured or reinsured, but all members of the pool divided premiums and losses proportionately among themselves.

B. The CIGNA Defendants Accept AFIA's Reinsurance Obligations

On December 31, 1983, the CIGNA defendants entered into purchase and assumption agreements with Home and the other members of AFIA. Under Section 1.1 of the purchase agreement, entitled "Purchase and Sale," the CIGNA defendants agreed to purchase all interests in and rights to the policies and contracts that Home and the other AFIA members entered into through the AFIA pool. This included Home's reinsurance contract with Nationwide for the Rutty Pool liabilities.

In fulfillment of its obligations under Sections 1.1 and 1.4 of the purchase agreement, CIGNA International Corporation caused its subsidiary, INA, to enter into an Insurance and Reinsurance Assumption Agreement ("Assumption Agreement") with Home and the other AFIA members. Under this Assumption Agreement, INA assumed "as its direct obligation and agree[d] to pay on behalf of [Home] when payment thereof is due all insurance and reinsurance liabilities ... included in the AFIA obligations." The Assumption Agreement further provided that "none of the [AFIA members] shall make any payments of any AFIA liability without the prior written approval of INA unless under order of a court ...."

The Assumption Agreement between the CIGNA defendants and the AFIA members also contained an arbitration clause nearly identical to the one in the reinsurance agreement between Home and Nationwide, and it included a choice of law clause providing that New York law would govern the agreement. Finally, the Assumption Agreement also stated:

> Nothing in this Assumption Agreement, express or implied, is intended, or shall be construed, to confer upon or give to any person, firm or corporation (other than the parties hereto ...) any rights or remedies under or by reason of this Assumption Agreement, or any term, provision, condition, undertaking, warranty, representation, indemnity, covenant or agreement contained herein ....

Some time after the Assumption Agreement was entered into, claims were made on policies Rutty had written in the name of Nationwide. These policies were among those reinsured by Home. The reinsurance on them had passed to the CIGNA defendants through the Assumption agreement.

C. The District Court's Ruling

In 1995, Nationwide sued Home and the CIGNA defendants, alleging that they had breached contracts under which they were required to cover the claims against Nationwide arising from the policies and contracts from the Rutty Pool. After the claims against Home were stayed pending arbitration, the CIGNA defendants sought summary judgment on the claims against them.

The district court held that Nationwide was not a third-party beneficiary to the agreements between the members of AFIA and the CIGNA defendants. The district court did, however, conclude that Nationwide was an obligee-beneficiary of these agreements and, as such, could pursue a claim directly against the CIGNA defendants for breach of contract under the terms of the

Assumption Agreement between Home and the CIGNA defendants. The court reasoned that the CIGNA defendants stood in the shoes of Home as a direct obligor to Nationwide for purposes of the reinsurance contract between Nationwide and Home. The district court further reasoned that the CIGNA defendants had assumed the reinsurance contract between Home and Nationwide and thus were bound by the arbitration provision in that agreement (the same one the district court relied upon to order arbitration of Nationwide's claims against Home). Therefore, the district court denied the CIGNA defendants' motion for summary judgment, referred Nationwide's claims against them to arbitration, and dismissed the entire case.

[548] II

The central issue on appeal is whether the district court erred in concluding that Nationwide could bring a claim directly against the CIGNA defendants by virtue of the CIGNA defendants' assumption of the reinsurance contract between Nationwide and Home, or whether Nationwide is limited to exercising its rights against Home with respect to payments under this reinsurance contract. The CIGNA defendants argue that Nationwide is precluded from suing them for reinsurance coverage because of the following language:

> Nothing in this Assumption Agreement, express or implied, is intended, or shall be construed, to confer upon or give to any person, firm or corporation (other than the parties hereto ...) any rights or remedies under or by reason of this Assumption Agreement, or any term, provision, condition, undertaking, warranty, representation,

> indemnity, covenant or agreement contained herein ....

The CIGNA defendants also contend that Nationwide's status as an obligee-beneficiary does not allow them to avoid the preclusive effect of the above-quoted disclaimer.

Nationwide cross-appeals the district court's ruling that it is not a third-party beneficiary of the agreements between Home and the CIGNA defendants. It raises the third-party beneficiary theory only as an alternative basis for allowing it to pursue a claim directly against the CIGNA defendants and does not seek to reverse the court's ruling that the CIGNA defendants are liable under an assumption theory. Nor does Nationwide challenge the district court's order submitting all of the claims against the CIGNA defendants to arbitration.

We hold that the CIGNA defendants are correct in asserting that Nationwide cannot bring suit directly against them (under either a third-party beneficiary theory or an assumption theory) to recover reinsurance benefits they assumed in their agreements with Home and the other members of AFIA.

A. Nationwide Cannot Bring a Claim Directly Against the CIGNA Defendants

[1] Under New York law, "where a contract's language expressly bars any contractual liability to a third party, no third party right to enforce the contract may be found." *Rosier v. Brown*, 158 Misc.2d 748, 601 N.Y.S.2d 554, 557 (N.Y.Sup.Ct. 1993) (citing *Nepco Forged Prods., Inc., v. Consolidated*, 99 A.D.2d

508, 470 N.Y.S.2d 680, 681 (N.Y.App.Div. 1984)). This is exactly what the third-party disclaimer provision in the Assumption Agreement between the CIGNA defendants and the members of AFIA does.

Despite Nationwide's valiant efforts to concoct alternative meanings of the third-party disclaimer language that would not preclude it from suing the CIGNA defendants on the reinsurance contract they assumed from Home, we hold that the third-party disclaimer language is clear and unequivocal. It bars any person or entity, except the parties to the Assumption Agreement (the members of AFIA and the CIGNA defendants), from suing on any of the obligations undertaken pursuant to the Assumption Agreement, including the CIGNA defendants' obligation to make payments on the reinsurance contract between Nationwide and Home. Under New York law, contract language is ambiguous "when it is reasonably susceptible to more than one reading." *Haber v. St. Paul Guardian Ins. Co.*, 137 F.3d 691, 695 (2d Cir. 1998). We do not find reasonable any construction of the disclaimer at issue that seeks to qualify or limit its broad, simple, and absolute language preventing any third party from enforcing the Assumption Agreement.

When the members of AFIA assigned their policies and contracts to the CIGNA defendants, they were free to negotiate an agreement under which the CIGNA defendants as assignees would permit direct recourse against themselves if they did not fulfill their obligations under the reinsurance contracts of Home and other members of AFIA. The AFIA members did not do this. Instead, they signed an agreement that

expressly excluded insureds from having recourse against the assignees if those assignees failed to satisfy their obligations under [549] the Assumption Agreement. This left the insured with exactly the same recourse they would have had if Home and the other members of AFIA had never entered into the Assumption Agreement.

There is nothing wrong with this. Nationwide is not without recourse. It can pursue its claims against Home. If coverage is due, Home will be forced to meet its obligation to Nationwide and then seek indemnification from the CIGNA defendants or Home may implead the CIGNA defendants as third-party defendants to Nationwide's action for reinsurance payments. The insolvency of Home could affect this. However, as we explain below, we need not consider the effects that insolvency may have on the parties' respective rights and obligations because this issue is not yet ripe for review.

[2] The district court's holding that Nationwide was entitled to pursue its claims for breach of the assignment agreement directly against the CIGNA defendants was premised on a legally erroneous distinction between obligee-beneficiaries and third-party beneficiaries. Obligee-beneficiaries are simply one type of third-party beneficiaries. 4 *Corbin on Contracts* § 774 at 6 (7th ed.1989). Therefore, whether or not Nationwide is an obligee-beneficiary is of no legal significance. It is still not a party to the agreement between the members of AFIA and the CIGNA defendants and thus is precluded from bringing a claim directly against the CIGNA defendants to enforce the

reinsurance obligations the CIGNA defendants assumed from Home.

Our conclusion that under the circumstances of this case Nationwide cannot be considered a party to the agreement between the members of AFIA and the CIGNA defendants is supported by *Nicholson v. 300 Broadway Realty Corp.*, 7 N.Y.2d 240, 196 N.Y.S.2d 945, 164 N.E.2d 832, 836 (1959). In *Nicholson*, an embossing company entered into an agreement with an adjoining building owner, Nicholson, to furnish steam heat to Nicholson's building. *Id.* 164 N.E.2d at 833. Some years later, the embossing company assigned this obligation to 300 Broadway Realty, which expressly assumed the obligation to provide steam heat to Nicholson's building, but failed to do so. *Id.* at 164 N.E.2d 832 at 834-36. Nicholson then sued 300 Broadway Realty under the contract Broadway had assumed. The New York Court of Appeals held that, for purposes of the assumption contract, the embossing company was the promisee, 300 Broadway Realty was the promissor, and Nicholson was a "third-party beneficiary." [FN3] *Id.*

> FN3. Although Nationwide is a third party to the Assumption Agreement in the sense that it is not a party to it, for reasons explained below, unlike Nicholas, Nationwide cannot be classified as a third-party beneficiary entitled to bring suit to enforce an agreement to which it is not a party.

[3] It is clear that the disclaimer barred third parties from enforcing rights under the contract applies to Nationwide. Nationwide argues that it should be deemed beyond the scope of the disclaimer because the CIGNA defendants directly assumed Home's

reinsurance obligation to Nationwide in the sense that they agreed to make payments directly to Nationwide and other insureds. This argument fails, however, because whether or not there was a direct assumption does not alter the decisive fact that Nationwide is a stranger to the Assumption Agreement through which it seeks to impose liability upon the CIGNA defendants.

Since Nationwide cannot bring suit directly against the CIGNA defendants on the Assumption Agreement or any obligations assumed therein, it cannot compel the CIGNA defendants to submit to arbitration under the terms of a contract they assumed in the Assumption Agreement with the members of AFIA.

B. Nationwide's Cross-Appeal

[4] Our resolution of the CIGNA defendants' appeal also disposes of Nationwide's cross-appeal regarding the district court's holding that Nationwide is not entitled to bring a claim directly against the CIGNA defendants under a third-party beneficiary theory. Nationwide is a third party to the Assumption Agreement in the same generic sense as every individual and entity on earth (other than the members of AFIA and the CIGNA defendants), in that it is not a party [550] to the agreement. As such, the disclaimer provision precludes it and all other third parties to the contract from enforcing it. By precluding any third party from enforcing the agreement, this same disclaimer defeats Nationwide's claim that it belongs to the discrete subset of generic third parties referred to as third-party beneficiaries, whose distinguishing characteristic is their legal right to enforce contracts to which they are not a party. See *Rosier v. Brown*, 158

Misc.2d 748, 601 N.Y.S.2d 554, 557 (N.Y.Sup.Ct. 1993) (citing *Nepco Forged Prods., Inc. v. Consolidated*, 99 A.D.2d 508, 470 N.Y.S.2d 680, 681 (N.Y.App.Div. 1984). Accordingly the district court was correct to hold that Nationwide is not a third-party beneficiary.

C. Issues Relating to the Insolvency Clause are not Ripe for Decision

[5] Finally, we refuse the CIGNA defendants' invitation to rule on the effects the insolvency clause of the Assumption Agreement may have on Nationwide's ability to pursue coverage under its reinsurance agreement with Home. Issues related to insolvency are not yet ripe for consideration on the merits. Home is not insolvent at this time. A basic tenet of the doctrine of ripeness is that "a matter is considered premature for judicial review when the alleged injury is speculative or may never occur." *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1068 (6th Cir. 1998) (citing *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)).

III

The judgment of the district court submitting Nationwide's claims against the CIGNA defendants to arbitration and dismissing the case is REVERSED. The claims against the CIGNA defendants cannot be submitted to arbitration because the express disclaimer in the Assumption Agreement prevents Nationwide from suing the CIGNA defendants to enforce the reinsurance obligations the CIGNA defendants assumed from Home. We remand the case to the district court to enter an

order dismissing Nationwide's claims against the CIGNA defendants.

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

NATIONWIDE MUTUAL INSURANCE CO.,
Plaintiff,

v.

THE HOME INSURANCE CO., et al.,
Defendants

Case No. C2-95-CV-880
Judge Sargus
Magistrate Judge Kemp

OPINION AND ORDER

Plaintiff Nationwide Mutual Insurance Company ["Nationwide"] brings this diversity action asserting various claims under an international reinsurance contract. Named as defendants are the Insurance Company of North America, INA Corporation, CIGNA Corporation and CIGNA International Corporation [collectively referred to as "the CIGNA defendants"], and the Home Insurance Company ["Home"]. The Court has stayed Nationwide's claims against defendant Home pending arbitration. Opinion and Order (Oct. 21, 1996). This matter is before the Court on the CIGNA defendants' motion for summary judgment.

Background

For purposes of resolving the instant motion, the underlying facts of this action are generally not in dispute. Nationwide participated in the M.E. Rutty Reinsurance Pool ["Rutty Pool"] from 1962 to 1966. The Rutty Pool managed direct and reinsurance business related to property and casualty risks. Participants, including Nationwide, insured or reinsured all or part of certain risks by entering into a cross-liability agreement whereby each participant assumed responsibility for money unpaid by another participant due to insolvency.

The amended complaint alleges that, in the mid-1970's, Nationwide sought to end its participation in the Pool when its account had nearly runoff, i.e., assets available to pay off claims under extant policies were nearly depleted. Nationwide allegedly entered into a tripartite agreement ["Reinsurance Agreement"], with Rutty and Home, whereby Home, acting as an issuing reinsurer for the American Foreign Insurance Association ["AFIA"], assumed the obligations, and succeeded to the rights, of Nationwide as a participant in the Rutty Pool. See Reinsurance Contract No. R (attached as exhibit 1 to Nationwide's Memorandum in Opposition to Motion for Summary Judgment (Oct. 25, 1996)). According to Nationwide, the purpose of the Reinsurance Agreement was only to assume potential liabilities, which at the time appeared to be minimal because the Rutty Pool had not issued any new policies during the preceding ten years.

It is undisputed that Home, at some time after the effective date of the Reinsurance Agreement, went into "runoff." According to defendants, Home continues to

be in runoff, but is still a functioning entity. According to Nationwide, Home's failure was the result of unexpectedly large asbestos and pollution losses and courts' liberal interpretation of insurance coverage for those losses.

In 1983, CIGNA purchased the assets of AFIA and assumed all AFIA obligations. See Purchase Agreement No. 1 (attached as exhibit 2 to Nationwide's Memorandum in Opposition to Motion for Summary Judgment). Home and INA (which appears to be a subsidiary of CIGNA, see page 2 of exhibit H attached to Purchase Agreement, letter from senior counsel at CIGNA representing that "CIGNA International, INA, and each Purchaser are indirect wholly owned subsidiaries of CIGNA"), among others, executed an Assumption Agreement effective "simultaneously with the Closing of the Purchase Agreement ...." Insurance and Reinsurance Assumption Agreement, at 1 (attached as exhibit 3 to Nationwide's Memorandum in Opposition).

It is undisputed that CIGNA and/or its subsidiaries thereafter administered the AFIA operations, including the Reinsurance Agreement between Nationwide and Home. Nationwide asserts that CIGNA executed Purchase Agreement No. 1 ["Purchase Agreement"] before realizing the extent of Rutty losses.

Nationwide brings claim for breach of contract, promissory estoppel, breach of fiduciary duty, breach of the covenant of good faith and fair dealing, and negligence. It is undisputed that New York law governs the parties' substantive disputes. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). The amended

complaint seeks compensatory and punitive damages and declaratory relief.

Analysis

Standard of Review

The procedure for granting summary judgment is found in Fed.R.Civ.P. 56(c), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The evidence must be viewed in the light most favorable to the nonmoving party. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). Summary judgment will not lie if the dispute about a material fact is genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby Inc., 477 U.S. 242 (1986). But summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The mere existence of a scintilla of evidence in support of the opposing party's position will be insufficient; there must be evidence on which the jury could reasonably find for the opposing party. Anderson, 477 U.S. at 251.

Breach of Contract

CIGNA asserts that the Court must dismiss Nationwide's claim for breach of contract. Count II of the First Amended Complaint alleges that the parties to the Purchase Agreement intended that anyone who had purchased insurance or reinsurance from Home, including Nationwide, would be a direct and intended third party beneficiary of the Purchase Agreement. The amended complaint further alleges that, although CIGNA assumed Home's obligations to Nationwide under the Rutty Pool, CIGNA has failed to fulfill those obligations.

CIGNA contends that the following provision in the Purchase Agreement precludes third parties such as Nationwide from enforcing provisions of the Purchase Agreement:

> ... this [Agreement] shall be binding on and inure to the benefit of the parties hereto and their respective successors and assigns. Nothing in this [Agreement], express or implied, is intended, or shall be construed, to confer upon or give to any person, firm or corporation (other than the parties hereto and their permitted successors and assigns), any rights or remedies under or by reason of this [Agreement], or any term, provision, condition, undertaking, warranty, representation, indemnity, covenant or agreement contained herein.

Purchase Agreement, ¶12 (emphasis supplied). CIGNA asserts that such provision is controlling under New York law. See Nepco Forged Products, Inc. v.

Consolidated Edison Co. of New York, Inc., 470 N.Y.S.2d 680, 681 ("Where a provision exists in an agreement expressly negating an intent to permit enforcement by third parties, as exists in the agreement at bar, that provision is decisive.") (citation omitted)

Nationwide, on the other hand, contends that the general purpose of the Purchase Agreement was for CIGNA to assume the obligations of Home, and that the Court should therefore disregard the disclaimer provision, which Nationwide discards as "boilerplate." Nationwide argues, instead, that it states a claim as an intended third party beneficiary of the Purchase Agreement between Home and CIGNA. See Twin City Construction Co. of Fargo, N.D. v. ITT Industrial Credit Co., 358 N.W.2d 716 (Minn. 1984) (construction company was a third party beneficiary to financing agreement between a bank and a development company where a condition of that agreement was that construction company execute a subrogation agreement releasing mechanic's lien on the subject property and promising to complete the project even if the development company defaulted on its payments to construction company) (citing Restatement (Second) of Contracts, §302 (1979)[1]). The Court agrees with

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[1] §302, which addresses intended beneficiaries, provides:

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promisee to pay money to the beneficiary; or

CIGNA that ¶12 of the Purchase Agreement clearly and unambiguously prevents anyone from claiming status as a third-party beneficiary to that Agreement. See Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., Inc. 66 N.Y.2d 38, 44 n.2 ("intention [to benefit a third party] can be negated by express agreement of the promisor and the promisee"). Nationwide therefore fails to state a claim as a third party beneficiary to the Purchase Agreement. Likewise, the Court holds that Nationwide fails to state a claim under New York law that CIGNA waived its right to enforce the disclaimer provision. Data Electric Co., Inc. v. NAB Construction Corp., 383 N.Y.S.2d 14, 15 (1976) ("We are unaware of any authority (and our attention has been called to none) which goes so far as to create privity of contract on which a plaintiff seeks to predicate liability because of the waiver of the defendant of benefits flowing to it in a contract with a third party.")

However, rejection of Nationwide's status as a third-party beneficiary is not necessarily dispositive of Nationwide's claim for breach of contract. §1 of the Purchase Agreement, which relate to the purchase and sale of AFIA interests, provides in part:

> ... [Home and others] severally agree to sell and assign to one or more of the Purchasers, and CIGNA agrees to purchase or to cause such Purchaser or Purchasers to purchase, ... all of the [Home's] right, title and interest in and to the

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(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

> AFIA Interests .... CIGNA agrees, on the terms and conditions of this Agreement, on the Closing Date to cause one or more of the Purchasers and INA to assume the AFIA Obligations, becoming primarily liable in respect thereof ....

Purchase Agreement, §1.1.

Home, by means of that provision, unambiguously assigned its rights and delegated its duties under the Reinsurance Agreement to CIGNA. As a result, CIGNA stepped into the shoes of Home as a party to the Reinsurance Agreement. Nationwide may therefore pursue a claim for breach of contract as an obligee-beneficiary of the Purchase Agreement. See 4 Corbin on Contracts §866, at 453 (1951) ("The assumption of the assignor's duty by the assignee merely gives to the other party a new and added security"). As set forth below, New York law supports this holding.

"The mere assignment of a bilateral executory contract may not be interpreted as a promise by the assignee to the assignor to assume the performance of the assignor's duties, so as to have the effect of creating a new liability on the part of the assignee to the other party to the contract assigned." Kagan v. K-Tel Entertainment, Inc., 568 N.Y.S.2d 756, 758 (1991) (citation omitted). "The rule is otherwise if the circumstances surrounding the assignment fairly indicate a contrary intention." Goldsmith v. Deitchman, 69 N.Y.S.2d 148, 151-52 (1947). "[I]n the absence of an affirmative assumption, an assignee is not liable on any covenants or agreements by which the assignor may have bound himself ...." Hudson Engineering

Associates, P.C. v. Ames Development Corp., 643 N.Y.S.2d 677, 678 (1996).

Case law from other states support those general propositions. See e.g. Cascade Shopping Center v. United Grocers, Inc., 106 Or.App. 428 (1991) (In general, if an assignment of contract is valid, it does not impose on assignee liabilities of assignor without assignee's assumption of those liabilities; by assuming assignor's liabilities, assignee creates privity of contract with party to whom assignor is liable); Banner Supply Co. v. Habitat 1 Construction Corp., 519 So.2d 1 (Fla. 1987) (generally unless the assignee assumes the assignor's duties or liabilities, assignee is not affirmatively liable to debtor); Meyers v. Postal Finance Co., 287 N.W.2d 614 (Minn. 1979) (assignment of a contract does not impose upon assignee duties or liabilities imposed by contract on assignor in the absence of the assignee's specific assumption of such liabilities); Farmers Acceptance Corp. v. DeLozier, 178 Colo. 291 (1972).

In Explosive Chemical Co. v. William S. Gray & Co., 207 N.Y.S. 638 (1925), defendant agreed to perform most of the obligations owed by the plaintiff to the federal government arising under a contract in return for payment as required by the original contract less a commission to be paid by defendant to plaintiff. Defendant complied as promised. After plaintiff agreed to satisfy the remaining obligation of the original contract, plaintiff sued defendant to recover.

The court, finding in favor of the plaintiff, held that, if the assignee is obligated to perform the assignor's obligation to a party to the original contract,

the "[a]ssignor of contract is secondarily, and assignee primarily, liable for performance." Explosive Chemical, 207 N.Y.S. at 638. The court explained:

> the defendant is under a duty to repay the plaintiff, because the plaintiff as assignor became only secondarily liable, while the defendant was in effect primarily liable, and consequently the plaintiff, in paying the debt when the principal debtor did not, was subrogated to the rights which the United States could have had against the defendant by exercising its privilege to ratify the assignment, and so plaintiff can hold defendant for the payment ....

Explosive Chemical, 207 N.Y.S. at 643.[2]

Here, CIGNA expressly assumed Home's liabilities to the Rutty Pool. In doing so, CIGNA received the benefits available to Home under the Rutty Pool, and CIGNA cannot walk away from its obligations which it voluntarily agreed to assume.

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[2] The Supreme Court of New York reversed that decision on the basis that "there never was an assignment of the contract." Explosive Chemical Co. v. William S. Gray & Co., 212 N.Y.S. 324, 326 (1925). The court noted that defendant had agreed to assume most, not all, obligations of the plaintiff to the original contract. However, the appellate court did not take issue with the lower court's legal analysis that defendant, by virtue of its agreement with plaintiff, was contractually bound to the government to perform certain obligations despite the fact that the government was not a party to the agreement between plaintiff and defendant.

The Court has thoroughly reviewed the Purchase Agreement and is unable to locate any provision exempting CIGNA from assuming Home's obligation to the Rutty Pool. On the contrary, the Purchase Agreement reflects that CIGNA affirmatively intended to assume Home's AFIA obligations, including Home's obligation to the Rutty Pool.[3] A review of applicable New York law, while sparse, in addition to case law from other states, supports the Court's conclusion that Nationwide, as an obligee-beneficiary, states a claim for breach of contract against CIGNA.

Liability of INA

Defendant INA asserts that, regardless of the potential liability of the other CIGNA defendants, it has no liability because it is not a party to the AFIA agreements. Nationwide appears to concede that defendant INA is not a party to the AFIA agreements. INA has submitted an affidavit of James Sears, vice-president and controller of INA, who avers that "INA Corp. is not a party to the AFIA Agreements. ... Moreover, INA Corp. is not obligated directly or indirectly or by way of side agreement or otherwise to perform any of the duties and obligations arising under any of the AFIA Agreements." Sears Affidavit, ¶2 (attached as exhibit C to CIGNA's Reply Memorandum (Nov. 15, 1996)).

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[3] Indeed, CIGNA admitted at oral argument that Home could seek relief against CIGNA in the event that Nationwide prevails against Home in the instant action.

However, the Purchase Agreement signed by INA provides that "one or more of the Purchasers and INA are to assume certain obligations, all as more fully described herein ...." Purchase Agreement, at 2. The Purchase Agreement goes on to state that "CIGNA agrees, on the terms and conditions of this Agreement, on the Closing Date to cause one or more of the Purchasers and INA to assume the AFIA Obligations, becoming primarily liable in respect thereof." Purchase Agreement, §1.1 (emphasis added). Moreover, the Assumption Agreement provides, "INA hereby assumes as its direct obligation and agrees to pay on behalf of each Seller [including Home] when payment thereof is due all insurance and reinsurance liabilities of each of the Assigning Sellers arising under or related to the business of AFIA described in Section 1.1(c)(ii) of the Purchase Agreements and included in AFIA Obligations ...." Assumption Agreement, ¶2. The Assumption Agreement further provides that "INA shall (1) administer and service the AFIA Liabilities including their investigation, payment, settlement, defense and the processing and collection of any reinsurance related thereto, (2) have authority to act in the name of a Seller as may be required to perform such administration and service, and (3) bear all costs and expenses related to the AFIA Liabilities and their administration and services .... Assumption Agreement, ¶3.

The language from the Assumption Agreement belies INA's assertion that it has no obligation to perform any of the duties arising under the AFIA agreements. Accordingly, the Court declines to dismiss INA as a party defendant.

Arbitration

The Court has already determined that Nationwide must arbitrate its claims against Home. Opinion and Order (Oct. 21, 1996).[4] CIGNA, standing in the shoes of Home, is bound by the same arbitration provision which Home, CIGNA's predecessor in interest, successfully enforced against Nationwide.

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[4] The Reinsurance Agreement has an arbitration clause which provides in pertinent part:

> As a precedent to any right of action hereunder, if any dispute shall arise between the Reinsured and the Reinsurers with reference to the interpretation of this Contract or their rights with respect to any transaction involved, whether such dispute arises before or after termination of this Contract, such dispute, upon written request of either party, shall be submitted to three arbitrators, one to be chosen by each party, and the third by the two so chosen. ... All arbitrators shall be executive officers of insurance or reinsurance companies or Underwriters at Lloyd's, London not under the control of either party to this Contract.
>
> The arbitrators shall interpret this Contract as an honorable engagement and not as merely a legal obligation; they are relieved of all judicial formalities and may abstain from following the strict rules of law, and they shall make their award with a view of effecting the general purpose of this Contract in a reasonable manner rather than in accordance with a literal interpretation of the language. ...

Reinsurance Contract No. R, Article XIII (attached as exhibit A to Memorandum of Law of Defendant The Home Insurance Company (Oct. 13, 1995)).

Nationwide now asserts that its claims against CIGNA must also be referred to arbitration. See Supplemental Memorandum of Nationwide Mutual Insurance Company, at 5-6.

The Court agrees with Nationwide that arbitration in this instance is appropriate. Home agreed to arbitrate with Nationwide its disputes under the Rutty Pool. Reinsurance Contract No. R, Article XIII. CIGNA, by virtue of the assignment of rights and delegation of duties from Home, is bound by that arbitration provision. Purchase Agreement, §1.1.

In Compania Espanola de Petroleos S.A. v. Neureus Shipping S.A., 527 F.2d 966, 973 (2d Cir. 1975), cert. denied, 426 U.S. 936 (1976), the guarantor agreed both to perform balance of contract and to assume rights and obligations of the character. The Court held that the guarantor was obliged to arbitrate disputes between it and the agent under a contractual arbitration clause. See also Paine Webber Inc. v. Hartmann, 921 F.2d 507 (3d Cir. 1990) ("arbitration should be compelled unless it can be said with 'positive assurance' that the agreement to arbitrate does not cover the dispute") (cited with approval in Roney and Co. v. Kassab, 981 F.2d 894, 898 (6th Cir. 1992)).

While it is for the arbitration panel to initially determine the scope of the arbitration clause, the broad language of the contract requires the parties to arbitrate "any dispute ... with reference to the interpretation of this contract or their rights with respect to any transaction involved ...." Reinsurance Contract, Article XIII. See also Nat'l Union Fire Insurance Co. v. Belco Petroleum Corp., 88 F.3d 129, 136 (2d Cir. 1996)

("The provision covers 'all disputes which may arise under or in connection with this policy' and is not limited ... to disputes that require an interpretation of the AIG Policy.") Moreover, the Court believes that, in the interest of judicial economy, a single forum is best suited to resolution of all claims. Accordingly, this entire matter must be referred to arbitration.

Conclusion

For the foregoing reasons, CIGNA's motion for summary judgment is DENIED, and this action is REFERRED to arbitration pursuant to Article XIII of the Reinsurance Agreement. Accordingly, this action hereby is DISMISSED.

/s/ Edmund A. Sargus, Jr.
Edmund A. Sargus, Jr.
United States District Judge

3-25-97
Date

JUDGMENT OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO

Nationwide Mutual Insurance Co.,
Plaintiff,

v.

The Home Insurance Co., et al.,
Defendants.

JUDGMENT IN A CIVIL CASE

Filed March 25, 1997

Case No.: C2-95-880
Judge Sargus
Magistrate Judge Kemp

[ ] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury as rendered its verdict.

[X] **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is hereby **DISMISSED** pursuant to the Court's March 25, 1997 Opinion and Order denying CIGNA's motion for

summary judgment and **REFERRING** this action to arbitration pursuant to Article XIII of the Reinsurance Agreement.

March 25, 1997
Date

KENNETH J. MURPHY
Clerk

/s/ Michael Carey
(By) Deputy Clerk
Michael Carey